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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SCOT RICHARDSON,

Plaintiff and Appellant,

v.

THOMAS J. HUTCHINSON et
al.,

Defendants and
Respondents.

2d Civil No. B277355
(Super. Ct. No. 1466685)
(Santa Barbara County)

Scot Richardson, M.D., appeals from an order of the Santa Barbara County Superior Court (the Santa Barbara court) confirming an arbitration award and denying his motion to vacate the award. The arbitrator awarded Richardson nothing for his legal malpractice claims against Thomas J. Hutchinson and Norman Dowler, LLP (collectively Norman Dowler). She awarded \$80,917.74 against him on Norman Dowler's cross-claim for unpaid legal fees.

Richardson challenges only the fee award. He contends the fee agreement is unenforceable as against public policy because it contains an illegal collection provision and because his attorneys did not disclose a conflict of interest that arose during the representation. He also contends that only the Ventura County Superior Court (the Ventura court) had jurisdiction to confirm the fee portion of the award because the arbitration occurred in Ventura. We affirm.

BACKGROUND

Hutchinson and Norman Dowler represented Richardson in a marital dissolution proceeding in the Santa Barbara court. The retainer agreement provides for binding arbitration of all disputes before a sole arbitrator in Ventura in accordance with the California Code of Civil Procedure, except disputes over legal fees which are to be resolved through the California State Bar's process. (Bus. & Prof. Code, § 6200 et seq.)

The retainer agreement provides that each party will pay their own costs and attorney's fees in the event of a dispute. But it also contains a nonreciprocal collection costs provision which obligates Richardson, if he does not pay his legal bill, to pay "the full hourly rate for all time actually expended" by Norman Dowler attorneys and staff in connection with collection activities. Hutchinson testified at the arbitration that the collection provision was "specifically tailored to deal with what [he] call[s] the *Trope*¹ problem, which is . . . if you're a self-represented attorney, you don't incur attorney fees, so you don't have anything to recover" He testified that he did not explain the provision to Richardson. In correspondence, Hutchinson referred to a similar provision in an expert's contract

¹ *Trope v. Katz* (1995) 11 Cal.4th 274 (*Trope*).

as “unethical,” and “wonder[ed] if . . . he uses this to [intimidate] parties.”

Richardson became dissatisfied with Norman Dowler’s work and stopped paying his bills. Norman Dowler initiated collection proceedings under the State Bar process by serving Richardson with notice of his right to arbitrate their fee claim. Six weeks later, Richardson filed a complaint in the Santa Barbara court against Hutchinson and Norman Dowler for professional negligence and breach of fiduciary duty.

Norman Dowler demanded arbitration of Richardson’s complaint. Richardson agreed to arbitrate, but only on the condition that the arbitration would be conducted in Santa Barbara. He took the position that the Ventura venue provision was invalid.

The Santa Barbara court ordered arbitration upon stipulation of the parties. They stipulated that they “entered into a written Fee Agreement that calls for binding arbitration”; they “agreed to resolve the Action by way of binding Arbitration in Santa Barbara, California”; and that “[t]he [Santa Barbara Superior] Court shall retain jurisdiction over the Action in order to confirm, correct, or vacate the award pursuant to Code of Civil Procedure [s]ection 1285.” About a month later, Richardson agreed to resolve Norman Dowler’s fee claims in the same arbitration. He agreed in writing “to consolidate the hearing on the fee recovery dispute and professional malfeasance claims.”

The parties selected an arbitrator from Los Angeles. A few days before the hearing, she informed them she would “go as far as Ventura” without charging for travel. The parties relocated the hearing to Ventura in order to avoid paying for her travel time, hotel, and meals. They did not amend or discuss

their stipulation that the award would be confirmed, vacated, or modified in the Santa Barbara court.

Richardson discovered during the arbitration that a Norman Dowler paralegal accepted a job with opposing counsel while she was working on his dissolution case. She was his primary contact at Norman Dowler and had access to his confidential files. She worked 11 days on his case after accepting her new employment and before she left for the opposing firm.

The opposing firm created an ethical wall between the paralegal and other employees in regards to the Richardson matter and notified Norman Dowler. Norman Dowler did not tell Richardson about the paralegal's new employment with opposing counsel. It continued to represent him. When Richardson learned about the paralegal's conflict and heard testimony from Hutchinson about the collection provision, he added a claim for unfair business practices and argued before the arbitrator that the entire agreement was unenforceable because it was illegal or in violation of public policy.

After an evidentiary hearing, the arbitrator issued a written award. She found Norman Dowler did not inform Richardson when the paralegal was hired by the opposing firm and did not inform him of his option to seek to disqualify the firm based on the conflict. But she found he suffered no prejudice or damage because the paralegal never discussed Richardson's matter with anyone at the opposing firm, Richardson would not have terminated Norman Dowler if he knew of the conflict, and the court would not have disqualified the opposing firm because the paralegal disclosed no confidential information. She found Norman Dowler's failure to disclose the conflict did not rise to breach of fiduciary duty because it caused no damage, and

Norman Dowler did not engage in any unlawful, unfair, or fraudulent practices.

The arbitrator awarded \$80,917.74 to Norman Dowler on its fee claim. She disallowed recovery for all services rendered during the 11 days that the firm had the undisclosed conflict (about \$12,000.00). She disallowed Norman Dowler's claim for \$161,618 in collection costs after finding the collection provision was unenforceable, but severable. She found that Richardson had time to read and consider the terms of the agreement including the collection provision, he was advised to consult with an attorney before signing it, and Norman Dowler did not exert any undue influence to secure his signature. She also disallowed recovery for Norman Dowler's work on an imprudent motion to quash and related sanctions.

Hutchinson and Norman Dowler petitioned the Santa Barbara court to confirm the arbitration award. Richardson moved to strike or transfer the petition on the ground that it must be heard in the Ventura court where the arbitration was held. (Code Civ. Proc., § 1292.2.)² The Santa Barbara court denied Richardson's motion to strike or transfer. He filed a motion to vacate the award in which he reasserted his venue argument. Richardson also filed a petition for writ of mandate in this court asserting that only the Ventura court has jurisdiction to confirm the fee award. We summarily denied the petition. (*Richardson v. Superior Court* (June 28, 2016, B275674).)

The Santa Barbara court confirmed the arbitration award and denied Richardson's motion to vacate. Richardson filed a petition in the Ventura court to vacate the award. The

² All further statutory references are to the Code of Civil Procedure, unless otherwise stated.

Ventura court denied his petition after taking judicial notice of the Santa Barbara court's orders.³

DISCUSSION

The arbitration award is beyond our review, except for Richardson's contention that the fee agreement is unenforceable because it is wholly illegal—a claim we reject. We also conclude the Santa Barbara court had jurisdiction to confirm the fee award because Richardson agreed to have the fee dispute resolved in an arbitration over which he stipulated the Santa Barbara court had jurisdiction.

Enforceability of the Agreement

An arbitrator's legal and factual determinations are not generally subject to judicial review, even if the errors appear on the face of the award and cause substantial injustice.

(*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 6, 28 (*Moncharsh*)).) Section 1286.2 provides the exclusive grounds for vacating an arbitration award. (*Ibid.*) Richardson does not invoke it, but we construe his contention that the agreement was illegal as a claim that the arbitrator exceeded her powers within the meaning of section 1286.2, subdivision (a)(4).

If an otherwise enforceable arbitration agreement is contained in an illegal contract, a party may avoid arbitration altogether. (*Moncharsh, supra*, 3 Cal.4th at p. 29.) We review de novo a claim that the entire agreement or transaction is illegal, because the arbitrator's power depends on a valid agreement. (*Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 609-610 [court vacated an arbitration award for fees to an unlicensed contractor

³ We grant Norman Dowler's request for judicial notice of the Ventura court's minute order denying Richardson's petition to vacate the award.

because the entire transaction was illegal].) Judicial review does not extend to claims of partial illegality. (*Moncharsh*, at pp. 30, 32 [claim that a single fee-splitting provision of an attorney's employment contract was illegal was not subject to judicial review because it "goes to only a portion of the contract (that does not include the arbitration agreement)"].)

A contract with a single unlawful object is void. (Civ. Code, §§ 1550, 1598, 1608.) Courts will not enforce a contract for arbitration if its sole purpose is illegal or against public policy. (*Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 71, 73 [court properly denied petition to compel arbitration based on grounds for revocation because alleged statutory violations went "to the heart of" the agreement and were not "incidental"].)

The collection provision and the undisclosed conflict did not go to the heart of the fee agreement here, or render the entire transaction illegal. They were incidental to the main purpose of the contract: providing Richardson with licensed legal representation in a dissolution action.

The collection provision violated Civil Code section 1717 by unilaterally allowing Norman Dowler to recover for its attorneys' time spent in pro per collection activities. (*Trope*, *supra*, 11 Cal.4th 274.) And attorneys have a duty to explain their fee agreements and not to enter into illegal or unconscionable fee agreements. (Bus. & Prof. Code, § 6148 [duty to explain fee agreement]; Rules Prof. Conduct, rule 4-200(A) ["A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee"].) But even if the collection provision violated these principles, it was collateral to the main and lawful purpose of the agreement to provide legal representation. The arbitrator correctly severed the

unenforceable collection provision and enforced the rest of the agreement. (Civ. Code, §§ 1599 [contract is void as to unlawful object and valid as to lawful object], 1670.5 [court may refuse to enforce an unconscionable clause and enforce the remainder]; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 124 [court may sever illegal provision that is collateral to the main purpose of the contract and enforce the remainder].)

Similarly, the undisclosed paralegal conflict did not render the agreement wholly unenforceable because the ethical violation did not permeate the transaction. Attorneys and paralegals have statutory and ethical duties to protect client confidences, avoid adverse interests, and keep clients informed. (Bus. & Prof. Code, §§ 6068, subds. (e)(1) & (m) [attorney's duties to maintain inviolate client confidences and keep client informed], 6453 [paralegal's duties]; Rules Prof. Conduct, rules 3-100 [duty to protect client confidences], 3-310(B) & (E) [duty to avoid representing adverse interests].) An attorney may not generally recover for services rendered in violation of the rules of professional responsibility. (*Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 618 [attorney could not recover fees for representing interests adverse to former client]; *A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072, 1079 [a law firm could not recover any fees for representation during a disqualifying conflict of interest].) But the arbitrator awarded no fees for services rendered during the conflict period, and Norman Dowler's nondisclosure of that conflict did not permeate its work for Richardson in the dissolution case.⁴

⁴ Whether a court may rely on nonlegislative expressions of public policy (such as ethical rules concerning conflicts of

The many nonarbitration cases upon which Richardson relies do not control because they involved ethical violations that permeated the agreements, rendering them wholly unenforceable. (*Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [an attorney could not recover a fee from another attorney based on a fee-splitting agreement to which the client did not consent]; *Scolinos v. Kolts* (1995) 37 Cal.App.4th 635, 640 [accord]; *Goldstein v. Lees, supra*, 46 Cal.App.3d at p. 618 [attorneys could not enforce a fee agreement for representing interests adverse to their former client]; *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1158 [attorney could not recover fees incurred during unethical business transactions between himself and his clients where no part of the transactions was severable and all the attorney's services were "part and parcel" of the illegal transactions]; cf. *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 12 [attorneys could not recover fees for that portion of services rendered after they undertook representation of the client's wife in a dissolution action against him, but could recover for fees incurred before the conflict arose].)

Where the illegality goes only to a portion of the agreement, we enforce the legal portion of the agreement and disallow fees for the illegal services, as the arbitrator did here. (*Birbower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 138 [reversing trial court order disallowing

interest) to overturn an arbitration award is a question pending before the California Supreme Court. (See *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2016) 244 Cal.App.4th 590, review granted Apr. 27, 2016, S232946.) We do not reach it because the ethical violations here did not permeate the agreement.

all fees where only part of the work involved unlicensed legal representation in California, and other work included licensed legal representation in New York].) We will not disturb the arbitrator's decision disallowing services based on partial illegality. (*Moncharsh, supra*, 3 Cal.4th at pp. 30, 32.)

Richardson also argues that an arbitrator exceeds her powers if the award violates a statutory right or a well-defined public policy. (*Department of Personnel Administration v. California Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 1195, 1200 [arbitrator exceeded her powers by reforming provisions of a memorandum of understanding that had already been approved by the Legislature].) But the award here violated no such right or policy, as discussed above. (See *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1418 [claim that the attorney fee awarded by an arbitrator was against public policy because it was unconscionable in violation of the State Bar Rules of Professional Conduct was beyond judicial review].)

Jurisdiction to Confirm the Award

The Santa Barbara court had jurisdiction to confirm the award by agreement of the parties. Richardson filed his professional negligence complaint there; stipulated that it had jurisdiction to confirm, correct, or vacate the award; and then agreed to consolidate the fee claim into the arbitration.

Richardson argues that only the Ventura court had power to confirm the award because section 1292.2 generally provides that a petition to confirm an arbitration award must be filed in the county where the arbitration was held. But a court in which a petition to arbitrate is filed retains jurisdiction to determine any subsequent petition involving the same agreement

to arbitrate and the same controversy. (§ 1292.6.) The parties invoked this jurisdiction over Richardson's claims by stipulation, and Richardson agreed the fee dispute would be resolved under the same arbitration agreement as part of the same controversy. He points out that Norman Dowler did not file a cross-claim for fees in the Santa Barbara court, but he waived that distinction when he agreed to have the fee claim resolved in the same arbitration. (Bus. & Prof. Code, § 6204 [parties to attorney's fee dispute may agree to be bound by arbitration]; *Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert* (2011) 194 Cal.App.4th 519, 529 [parties may submit to arbitration issues they are not contractually bound to submit].)

DISPOSITION

Norman Dowler's request for judicial notice is granted. The orders are affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

Radoslovich | Parker | Turner, Port J. Parker,
Joseph F. Klatt and Jeffrey S. Einsohn, for Plaintiff and
Appellant.

Berg Law Group and Eric Berg, for Defendants and
Respondents.